JEFFREY M. HAHN (admitted pro hac vice)
hahn.jeffrey.m@dol.gov
DAVID M. ELLIS (pro hac vice application pending)
david.ellis.m.@dol.gov
Office of the Solicitor
Plan Benefits Security Division
United States Department of Labor
P.O. Box 1914
Washington, DC 20013
Tel: (202) 693-5600; Fax: (202) 693-5610

Attorneys for Plaintiff SETH D. HARRIS,
Acting Secretary of Labor, United States Department of Labor

UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

SETH D. HARRIS, Acting Secretary, United States Department of Labor, Plaintiff, v. **GREATBANC TRUST COMPANY, et al.,** Defendants.	Case No. EDCV12-1648-R (DTBx) **SECRETARY'S RESPONSE TO GREATBANC'S STATEMENT OF RECENT DECISION**

In its Statement of Recent Decision, Dkt. No. 34, Defendant GreatBanc Trust Company ("GreatBanc") seeks to bring to the Court's attention an opinion from another jurisdiction that purportedly supports its motion to dismiss. That decision is irrelevant and, if anything, supports the Secretary's position.

In his Second Claim for Relief, the Secretary asserts that the indemnification agreement between Defendant Sierra Aluminum Company ("Sierra") and GreatBanc is void under ERISA § 410(a), 29 U.S.C. § 1110(a), and the Secretary's regulation interpreting it, 29 C.F.R. § 2509.75-4. As the Secretary explained in opposition to Defendants' motions to dismiss, § 410(a) broadly prohibits agreements that purport to relieve fiduciaries of liability for their fiduciary duties; only fiduciary liability insurance is exempted. See 29 U.S.C. § 1110(a). While the Department of Labor's regulation states that § 410(a) also exempts indemnification agreements that operate "in the same manner as insurance," the Department has made clear that this indemnification exemption does not extend to "arrangement[s] for indemnification of a fiduciary of an employee benefit plan by the plan," which plainly violate § 410(a). 29 C.F.R. § 2509.75-4. Because the Sierra Aluminum Employee Stock Ownership Plan (the "ESOP") is the 100% shareholder of Sierra – meaning that any indemnification that Sierra pays to GreatBanc would necessarily be borne by the ESOP – the Secretary alleges that the indemnification agreement violates § 410(a) and 29 C.F.R. § 2509.75-4.

The indemnification agreement at issue in the decision that GreatBanc now brings to the Court's attention is very different. Unlike the agreement here, the indemnification agreement in Schafer v. Multiband Corp., No. 12-13152, 2013 U.S. Dist. LEXIS 22057 (E.D. Mich. Feb. 19, 2013), did not obligate an ESOP-owned company to indemnify its fiduciary. Rather, the indemnification agreement in Schafer – as described by the parties themselves – was one "between a former fiduciary to an ESOP, on one hand, and a third-party stranger to the ESOP, on the other." Id. at *12-13. The court thus had no trouble concluding that the agreement did not violate either § 410(a) or 29 C.F.R. § 2509.75-4, which permit indemnification agreements between fiduciaries and third parties. Here, in contrast, the agreement is not between an ESOP fiduciary and a mere third party "stranger to the ESOP," Schafer, 2013 U.S. Dist. LEXIS 22057, at *12-13, but rather between a fiduciary (GreatBanc) and a company whose sole shareholder is an ESOP, in blatant violation of § 410(a) and 29 C.F.R. § 2509.75-4. At best, then, Schafer is irrelevant and of no assistance to Defendants.

If anything, Schafer provides even further reason to deny Defendants' motions to dismiss. In vacating the arbitrator's decision finding that § 410(a) prohibits all indemnification agreements involving an ERISA fiduciary, no matter the counterparty, the court in Schafer invoked the Department's interpretative bulletin, 29 C.F.R. § 2509.75-4, which the Department issued "a year after [ERISA's] enactment," and which has "been the department's position ever since." Schafer, 2013 U.S. Dist. LEXIS 22057, at *22. The court reasoned that the arbitrator's blanket prohibition on indemnification agreements contradicts 29 C.F.R. § 2509.75-4, which clearly permits certain types of indemnification agreements – specifically, those that operate in the same manner as insurance. Schafer, 2013 U.S. Dist. LEXIS 22057, at *22. The Secretary's Second Claim for Relief in this case likewise relies on § 2509.75-4, which just as clearly prohibits agreements that require ERISA plans to indemnify their fiduciaries, as the Sierra/GreatBanc agreement effectively does. Applying the same level of deference to § 2509.75-4 as the court applied in Schafer would result in entry of judgment in favor of the Secretary on his Second Claim for Relief, not its dismissal.

Dated: February 25, 2013

Respectfully submitted:

For the Secretary:

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

RISA P. SANDLER
Counsel for Fiduciary Litigation

/s/ *Jeffrey M. Hahn*
JEFFREY M. HAHN
Trial Attorney
DAVID M. ELLIS
Trial Attorney

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on counsel of record via the court's ECF system.

/s/ *Jeffrey M. Hahn*
JEFFREY HAHN